IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR
S.B. Civil Misc. Writ Petition No.3764/05
Radha Krishan & Anr. Vs. Suresh Kumar Sharma & Anr.

3.10.2007

Hon'ble Mr. Justice Mohammad Rafiq

Shri J.P. Gupta for petitioner.
Shri A.N. Khan for respondent.

REPORTABLE

The petitioner has challenged the order dated 7.5.2005 whereby his application filed under Order 9 Rule 7 CPC was dismissed as being not maintainable. The learned trial court while rejecting that application relied on the judgment of the Supreme Court in Arjun Singh vs. Mohindra Kumar-AIR 1964 SC 993 and this Court in Radhey Shyam Vs. State of Raj. & Ors.-RLR 1987 (2) 399.

The learned counsel for the petitioner at the outset, cited the

judgment of Hon'ble Supreme Court in Lal Devi & Anr. Vs. Vaneeta Jain & Ors., (2007) 7 SCC 200 and argued that the Hon'ble Supreme Court having considered its earlier judgment in Arjun Singh, supra held that the defendant cannot be made to suffer an ex-parte decree particularly when he was not at fault, having duly instructed his counsel to appear in the Court on the given date. In the present case, the learned counsel argued that evidence of the defendant could not be concluded on 19.4.2005 due to paucity of time and the matter was adjourned to 26.4.2005. The defendant could not himself appear on that date due to illness of his wife, whereas his advocate also omitted to appear because of his pre-occupation in other Court. In these circumstances, on that very same day, evidence of the

defendant was closed and finally arguments were heard and the matter was posted for judgment.

The learned counsel for the respondent opposed the writ petition and argued that the present case is distinguishable from Lal Devi, supra because in this case the defendant had been granted as many as several opportunities in the past and he had been deliberately avoiding to adduce his evidence. It was therefore argued that even this Court decided to give an opportunity to the defendant to produce evidence, it should be subject to payment of cost.

Having heard the learned counsel for the parties, I find that the facts of the present case to the extend that the evidence of the defendant was closed on

the same day, final arguments of the plaintiff was heard on the same day and the matter was posted for judgment on the same day are similar to the one in Lal Devi, supra. In fact, one opportunity ought to have been given by adjourning the matter to the next date. In the event, the defendant probably might have come to know of the development which could enable him to take steps to timely apply for setting aside ex-parte proceedings under Order 9 Rule 7 of CPC. Even in Radhey Shyam, supra, this Court held that in situation like this, when the case has been reserved for judgment soon after proceedings ex-parte are directed against the defendant, the defendant would not be remedyless because even if the law is silent in such a situation, the Court by use of inherent powers under Section 151 can always pass

appropriate orders for the ends of justice so as to meet such contingency. In Lal Devi, supra, also their Lordships held that passing of an ex-parte decree in a case of this nature would be too harsh a consequence to be upheld. The defendant cannot be made to suffer an ex-parte decree particularly when he was not at fault having duly instructed his counsel to appear before the Court on the date fixed. When the defendant petitioner had engaged his advocate, even if he could not attend the Court proceedings on 26.4.2005, it was expected of his lawyer to appear before the Court or make alternative arrangements. In the totality of circumstances, therefore, I deem it appropriate to grant at least one opportunity to the defendant to adduce and conclude evidence on one single day.

Result of the aforesaid discussion is that the impugned order dated 7.5.2005 is set aside with direction to the trial court to permit the defendant-petitioner to adduce his evidence by filing affidavits and/or producing his witness on the date next fixed from the date of production of the certified copy of this order or any other date as may be fixed by the Court at its convenience to conclude his evidence within a fortnight thereafter and within one month thereafter for evidence in rebuttal if any by the plaintiff. The evidence of the plaintiff shall be accepted upon the defendant paying to the plaintiff as cost of Rs.1,000/- before the trial court.

With these directions, the writ petition stands allowed.

RS/- **(Mohammad Rafiq),J.**